

**Reply of the Government of the
United States of America to the Report of the Five UNCHR
Special Rapporteurs on
Detainees in Guantanamo Bay, Cuba
March 10, 2006**

The Government of the United States appreciates the opportunity to respond to the above-mentioned Report relating to individuals detained at the U.S. Naval Station in Guantanamo Bay, Cuba ("Guantanamo") (hereinafter "Report").

I. INTRODUCTION

At the outset, and before addressing specifically issues related to detention at Guantanamo, we underscore that it is the law and the policy of the United States to treat all detainees and conduct all interrogations in a manner consistent with domestic legislation, including the Detainee Treatment Act of 2005 and the federal anti-torture statute (18 U.S.C. 2340 and 2340A), and with the commitments made by the United States in ratifying the Convention Against Torture, to prevent torture and other cruel, inhuman or degrading treatment or punishment.

The United States profoundly objects to the Report both in terms of process and of substance and underscores that the Report's factual and legal assertions are inaccurate and flawed. The United States provided substantial informational material regarding Guantanamo to the Special Rapporteurs and to the public, including our reply dated October 21, 2005, to the 45 questions posed by the Special Rapporteurs, our CAT Report and Annexes of May 2005, our updated CAT Annex of October 2005, and our ICCPR Report and Annexes of October 2005, and also our unprecedented offer to three of the Special Rapporteurs to visit the facility to observe first hand the conditions of detention. As far as the Report discloses, however, the Special Rapporteurs never considered the information provided by the United States.

We offered the Special Rapporteurs unprecedented access to Guantanamo, similar to that which we provide to U.S. congressional delegations. The Special Rapporteurs' Report neglected to mention the parameters of the proffered visit, which would have included meeting with the Commander of the Joint Task Force; receiving briefings by senior command, medical and operational staff; visiting the camps, cells, and medical facilities; and observing recreational, nutritional, and religious practices. (A Statement of the OSCE Parliamentary Assembly confirmed that the OSCE delegation had been afforded such access during their visit to Guantanamo on March 3, 2006, and "[a]s agreed with the US authorities" were also "able to ask questions and interact with [and] approach any officer, soldier or member of the staff they considered appropriate." OSCE Parliamentary Assembly Statement entitled "OSCE PA Special Representative Anne-Marie Lizin Visit to the Guantanamo detention facilities".) Access to the detainees themselves is provided to the International Committee of the Red Cross, the organization recognized under international law for this purpose.

It is particularly unfortunate that the Special Rapporteurs rejected the invitation to visit Guantanamo. As a result, their Report does not reflect the direct, personal knowledge that this visit would have provided. Rather, the Report is presented as a set of conclusions -- it selectively includes only those factual assertions needed to support those conclusions and ignores other facts that would undermine those conclusions. We categorically object to most of the Report's content and conclusions as largely without merit and not based in the facts.

We also underscore that the United States is a nation of laws governed by a constitutional democracy, with an independent judiciary and free press. The issues addressed in the Report are being fully and publicly debated and litigated in the United States. To preserve the objectivity and authority of their own Report, the Special Rapporteurs should have reviewed and presented objective and comprehensive material on all sides of an issue before stating their own conclusions. Instead, in the absence of any meaningful investigation, the Special Rapporteurs reached their own conclusions espoused by second- and third-hand accounts of Guantanamo and then presented an advocate's brief in support of them. In the process they have asserted the existence of *jus cogens* or non-derogable

norms without citation of binding authority in support, and have relied on international human rights instruments, declarations, standards, and general comments of treaty bodies without serious analysis of whether the instruments by their terms apply extraterritorially; whether the United States is a State Party -- or has filed reservations or understandings -- to the instrument; whether the instrument, declaration, standard or general comment is legally binding or not; or whether the provisions cited have the meaning ascribed to them in the Report. This is not the basis on which international human rights mechanisms should act.

Additionally the competence and expertise of the Commission on Human Rights do not extend to the laws and customs of war that may be applicable to detention of enemy combatants at Guantanamo Bay.

The United States respectfully submits that the Report must be viewed in this light, and its erroneous factual and legal conclusions rejected.

II. Summary of United States Position

Legal Framework

- o The President has determined that the United States Armed Forces shall treat all persons detained at Guantanamo humanely and in a manner consistent with the United States Constitution, laws, and treaty obligations.
- o The United States is engaged in a continuing armed conflict against Al Qaida, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.
- o Certain laws of war govern the conduct of that conflict and related detention operations.
- o By its express terms and clear negotiating history, the International Covenant on Civil and Political Rights ("ICCPR") applies to each State Party only with respect to "individuals within its territory and subject to its jurisdiction." The ICCPR thus does not cover operations in Guantanamo, which is not within U.S. territory.
- o According to established precepts of international humanitarian law, both lawful and unlawful enemy combatants may be detained without charges, trial or counsel until the end of active hostilities in order to prevent them from continuing to take up arms against the United States.
- o To apply the ICCPR to unlawful combatants leads to the manifestly absurd result that they receive more rights and privileges than lawful combatants, including the right to be prosecuted and brought to trial or released.
- o The United States categorically objects to the flawed legal analysis of the Report, which collapses under the weight of this and other errors.

Anti-Torture Law and Policy

- o The United States does not commit, authorize, or condone torture.

- o Torture is prohibited under United States statute and treaty, and persons who commit torture will be investigated, prosecuted, and punished by the United States Government.
- o The Detainee Treatment Act of 2005 codifies world-wide our policy against cruel, inhuman or degrading treatment as defined by U.S. obligations under the Torture Convention.

Detainees are Treated Humanely

- o Detainees are held only as long as is necessary, and over 267 detainees have been released or transferred from Guantanamo.
- o Although not historically practiced with regard to combatants, Combatant Status Review Tribunals and Administrative Review Boards were established to ensure that the United States does not hold detainees any longer than necessary.
- o Representatives of the ICRC visit Guantanamo regularly throughout the year and meet personally with detainees. Communications between the U.S. Government and the ICRC are confidential.
- o The Department of Defense has released to the public several photographs of the detention facilities in Guantanamo Bay. (At <http://www.defenselink.mil/news/detainees.html> (visited March 9, 2006)). These photographs reflect U.S. policy and practices regarding treatment of detainees at Guantanamo Bay, including the U.S. requirement that all detainees receive adequate housing, recreation facilities, and medical facilities.
- o Guantanamo detainees receive:
 - 3 nutritionally complete meals daily that meet cultural dietary requirements when requested and any medical requirements that may be applicable.
 - Adequate shelter, clothing and hygiene facilities.
 - Where security permits, detainees are eligible for communal living in a Medium Security Facility, with fan-cooled dormitories, family-style dinners, and increased outdoor recreation time, where they play board games like chess and checkers, and team

sports like soccer and basketball.

- Regular exercise, including recreation several hours a day for the most compliant detainees.
- Opportunity to worship, including prayer beads, oils, rugs, calls to prayer five times daily, and copies of the Koran in the detainee's native language.
 - Following allegations of Koran mishandling by the United States at Guantanamo, the Department of Defense conducted an investigation into the matter. The investigation, completed on June 3, 2005, found that in 31,000 documents covering 28,000 interrogations and countless thousands of interactions with detainees, five incidents of apparent mishandling of the Koran by guards or interrogators had occurred.
 - Some 1,600 Korans have been distributed as part of a concerted effort by the United States government to facilitate the desires of detainees to freely worship. The small number of very regrettable incidents should be seen in light of the volume of efforts to facilitate opportunities for religious practice at Guantanamo.
- The means to send and receive mail, including confidential mail for those detainees who have appointed counsel. Over 43,120 pieces of mail have either been sent or received by detainees at Guantanamo since it was opened. Some 18,580 pieces of mail were processed in calendar year 2005.
- Reading materials, including allowing detainees to keep some books in their cells. The library has both books and magazines that are offered to all compliant detainees. The library contains over 1800 pieces in 13 languages.
- Excellent medical, dental and optical care comparable to or exceeding that received by US Armed Forces deployed overseas.

- Wounded enemy combatants are treated humanely and nursed back to health, amputees are fitted with modern prosthetics, and those detainees who may need it are given physical therapy.
 - The lives of insurgents and detainees have been saved by superior medical treatment provided by US military personnel.
 - In order to protect the life and health of detainees, authorities are, as necessary, involuntarily feeding detainees on a hunger strike using acceptable medical protocols and procedures that are employed in United States' domestic prison facilities. As of March 6, 2006, there are only four detainees on hunger strike at Guantanamo Bay.
- Visit from legal counsel (over 100 counsel groups have been permitted to meet with over 130 detainees they represent)
 - Some counsel have visited their clients more than once. To date, virtually every request by American counsel of record in the habeas cases to visit detainees at Guantanamo has been granted, after that counsel has received the requisite security clearance, agreed to the terms of the protective order issued by the Federal court and submitted a request at least 20 days in advance of the proposed visit. The proposed visit dates in some cases have been adjusted based on other counsel visits that were already scheduled for the same time period. The Government does not listen in on these meetings (or read written correspondence between counsel and detainees).
 - The Government has allowed foreign government representatives and foreign and domestic media to visit the facilities. Over 100 members of the media have visited Guantanamo.

III. SUMMARY OF FLAWS IN SPECIAL RAPPORTEURS' REPORT

Process Issues

- The Special Rapporteurs issued their Report without visiting Guantanamo, despite our invitation to three Rapporteurs to visit the facility.
 - The proposed visit would have afforded unprecedented access for UN experts to a military detention facility and would have been similar to that which we provide to U.S congressional delegations.
 - Indeed the report selectively notes that the United States did not offer them unrestricted access to prisoners, but it does not mention that the United States invitation expressly offered them a visit that included:
 - meeting with the Commander of Joint Task Force Guantanamo and receiving a briefing on operations by senior command, medical and operational staff;
 - visiting the camps and cells housing the detainees;
 - visiting the medical facilities; and
 - observing operations at the facilities including recreational, religious, cultural and nutritional practices.
 - Had the invitation been accepted, the Special Rapporteurs would have observed first-hand the conditions of detention. This would have enabled them to assess:
 - the actual conditions of the detainees;
 - the superb medical treatment they receive, including the humane procedures in place with respect to those detainees; and
 - the measures taken by the United States to provide the detainees with Korans, to respectfully treat that holy book, and to structure operations of the facility to facilitate the practice of their religion.
 - It is instructive to compare their Report to the writings of individuals who have visited the

facilities and reported that they found it very different from their preconceptions.

- Not only have the Special Rapporteurs not come to Guantanamo, but they have not come to Washington to be formally briefed by appropriate DoD officials on GTMO operations, an invitation offered earlier last year.
 - DoD and State Department officials have met with the Special Rapporteurs in Geneva, but not for detailed discussions.
- The Special Rapporteurs also appeared to disregard the substantial informational material made available to them and to the public on Guantanamo detention and treatment, including the US government's:
 - lengthy written response to their 45 questions;
 - May 2005 report on its implementation of the Convention Against Torture, which included an lengthy annex on U.S. operations at Guantanamo;
 - October 2005 report on its implementation of the International Covenant on Civil and Political Rights; and
 - the vast information - including declassified documents - about Guantanamo available on the Department of Defense website;
 - as well as documents submitted to United States courts.
- Their draft Report accordingly contains serious errors of omission, for example regarding:
 - instructions and guidelines for involuntary feeding;
 - the excellent medical care provided to detainees;
 - the complete results of DoD investigation of reported misuse of the Koran, which found that reported instances of misuse were very few compared to total number of contacts with the Koran; and
 - corrective measures, such as the DoD prohibition on the use of dogs during interrogations.
- The draft Report also presumes factual allegations to be true without verifying them.
 - An example is the statement in paragraph 54:
"According to reports by defence counsels, some of

the methods used to force-feed definitely amounted to torture. In the absence of any possibility of assessing these allegations in situ by means of private interviews with detainees subjected to forced feeding, as well as with doctors, nurses and prison guards, the allegations, which are well substantiated, must be assessed to be accurate." Defense counsel's reports were refuted in court by Guantanamo medical personnel. This fact is completely ignored in the Report.

- o It is unfortunate that the special rapporteurs would make such a polemical allegation, based only on the statements of the detainees themselves and of their lawyers (whose basis for opinion would also be the statements of the detainees), and that they made no independent attempt to contact the doctors at Guantanamo to learn what actual medical procedures are used there.
- We profoundly disagree with the Report for its selective inclusion of only those factual assertions needed to support the Report's initial conclusions while avoiding facts that would undermine those conclusions.

Substance - Legal Errors

- The Report contains numerous glaring legal errors, of which we point out only the most egregious.
- At its core the Report asserts that the basis for the United States position that it is engaged in armed conflict is a rhetorical reliance on a generalized war on terrorism, that is, the Report states (or "strongly suggests") that we are not at war.
 - o This is wrong and demonstrates a remarkable forgetfulness of the armed attacks on the United States and the responsibility of the United States to defend itself.
 - o Al Qaida and its Taliban affiliates have waged war against the United States, a fact recognized by the United Nations Security Council, NATO, Australia under the ANZUS Treaty, and the members of OAS under the Rio Treaty. The conflict is ongoing, and our Reply will identify numerous terrorist acts committed by Al Qaida and its affiliates spanning

more than a decade resulting in death and injury to thousands of individuals world-wide.

- o To suggest that the United States may not defend itself in these circumstances is to allow an armed group to wage war against the United States while stripping us of the inherent right of self-defense.
- The law of armed conflict governs the conduct of armed conflict and related detention operations, and permits lawful and unlawful enemy combatants to be detained until the end of active hostilities without charges, trial, or access to counsel.
 - o Combatants may be detained to prevent them from taking up arms against the United States.
 - o This is the principal reason for Guantanamo detention, an important point which the Report questions and disregards.
 - o It is also the reason why the United States has given the International Committee of the Red Cross, rather than human rights rapporteurs, unimpeded access to the detainees at Guantanamo.
- The Report's improper conflation of the law of war (also known as international humanitarian law) and international human rights law is a fundamental flaw that undercuts virtually all of the Report's conclusions.
- The Report states that the ICCPR provides the rules governing Guantanamo detention and proceeds to charge the United States with a violation of several of its provisions.
 - o This is wrong: apart from the fact that operations at Guantanamo are governed under the law of war, by its express terms and clear negotiating record, the ICCPR applies to each State Party only with respect to "individuals within its territory and subject its jurisdiction." The ICCPR thus does not cover operations at Guantanamo, which is not United States territory.
 - o To apply the ICCPR to unlawful combatants leads to the manifestly absurd result that they receive more rights and privileges than lawful combatants, including the right to be prosecuted and brought to trial or released.

- The Report misinterpreted human rights law authorities.
 - It conflates *jus cogens* (peremptory) norms with the ICCPR's listing of non-derogable provisions applicable to States Parties to the Covenant (see ICCPR article 4).
 - This is wrong: While there is some overlap between these two categories of rights, for example regarding torture and slavery, the Report's equation is legally incorrect and is not supported by binding legal authority.
 - The draft Report relies on General Comments of the Human Rights Committee to set the norm for United States conduct.
 - This is wrong: The ICCPR does not govern Guantanamo operations and its treaty body's General Comments are the non-binding view of independent experts.
 - It holds that all incommunicado detention is prohibited under the CAT.
 - This is wrong: There is no binding legal authority for this proposition.
 - The Report persistently seeks to impose obligations on the United States that were explicitly rejected or otherwise could not be achieved in treaty negotiations.
 - It presumes binding legal obligations on the United States to use involuntary feeding only at a certain stage of a hunger strike and to allow persons in our custody to die.
 - This is wrong: The assertions of international law obligations are fabricated from whole cloth. There is not support for these propositions under international law, and we believe them to be contrary to our responsibility to protect the life and the health of persons under our custody at Guantanamo.

Factual Errors - a small sampling

- Feeding techniques amount to torture (para 54).
 - Techniques used are the same regimen used in custodial settings in the United States and are the preferred medical option.
 - Again, it is worth noting that this easily could have been verified if the Rapporteurs had accepted the invitation to visit with the doctors at Guantanamo or otherwise requested a meeting with such doctors at another venue.

- Health care has been conditioned on cooperation and has been denied, has been unreasonably delayed, and has been inadequate (para 70).
 - This allegation is false and nothing but an assertion, and indeed is contrary to evidence in the possession of the Special Rapporteurs. The Special Rapporteurs received comprehensive evidence of the extensive and regular medical and dental care provided to detainees.

- "There have been consistent reports about the practice of rendition and forcible return of Guantanamo detainees to countries where they are at serious risk of torture" -- a "United States practice of 'extraordinary rendition.'" (paragraph 55)
 - This is also false. It is explicit United States policy not to transfer individuals to other countries where the United States believes it is "more likely than not" that they will be tortured. In appropriate cases the United States obtains assurances from any receiving country that it will not torture the individual being transferred to that country.

- "The treatment of the detainees and the conditions of their confinement has led to prolonged hunger strikes." (paragraph 94).
 - This error shows the preconceptions of the special rapporteurs and ignores the fact that the Al Qaida training manual found in Manchester by British police instructs Al Qaida members taken into custody that one option is "to resort to a hunger strike" (para 7 of training manual).
 - Thus, while detainees' motivation for a hunger strike is based on prior terrorist training, the Report points the finger at the United States, one example of many of the bias of the Report.
- Interrogation "techniques meet four of the five elements in the Convention definition of torture."
 - This statement is wholly misleading. The four elements described in the report are:
 - acts conducted by government officials;
 - acts had a clear purpose (for example, to gather intelligence);
 - acts were committed intentionally; and
 - victims were in a position of powerlessness.
 - These four factors would apply to thousands of wholly benign acts regarding the treatment of any detainee anywhere in the world, including the use of incentives ranging from extra recreational time or access to extra sweets or reading materials. Saying that four of five elements of torture are satisfied creates the misleading impression that U.S. conduct is somehow abusive or nefarious.
- The Report baldly misquotes original sources, for example regarding the Secretary of Defense's April 16, 2003 memorandum on interrogation techniques (para 50 of Report)
 - The Report quotes the Secretary's memo as follows: "S. Change of Scenery Down might include exposure to extreme temperatures and deprivation of light and auditory stimuli"
 - The memo actually reads: "S. Change of Scenery Down: Removing the detainees from the standard interrogation setting and placing him a setting

that may be less comfortable; **would not constitute a substantial change in environmental quality.**" (Emphasis added.)

A fuller discussion of the numerous factual errors in the Report is contained in Section X of this Reply, and an extensive factual description of Guantanamo operations is contained in the USG Reply to the 45 Questions posed by the Special Rapporteurs dated October 21, 2005, attached as an Annex to this Reply.

IV. LAW OF WAR

We are first and foremost troubled by the Report's discussion of the legal rules governing Guantanamo detention. Nearly all of the legal conclusions of the Report are predicated on the false premise that the ICCPR provides the rules governing Guantanamo detention and treatment. It does not: the law of armed conflict provides the rules governing detention and treatment of enemy combatants in armed conflict, and the ICCPR by its terms applies only within the territory of the State Party. Accordingly, the entire legal underpinnings of the Report are erroneous, and its legal conclusions similarly flawed.

Nowhere does the Report set out clearly the rules that apply according to international and United States law. It is important to recall the context of the Guantanamo detentions. The war against Al Qaida and its affiliates is a real (not a rhetorical) war. The United States is engaged in a continuing armed conflict against Al Qaida, and customary law of war applies to the conduct of that war and related detention operations. The International Covenant on Civil and Political Rights, by its express terms, applies only to "individuals within its territory and subject to its jurisdiction" (ICCPR Article 2(1)), as discussed in detail below, and thus does not apply to Guantanamo.

The Report acknowledges that both lawful and unlawful combatants may be detained without charges, trial or counsel until the end of active hostilities (paragraph 24). The Report also acknowledges that the law applicable in armed conflict is the *lex specialis* (paragraphs 18 & 21). However, the Report's legal discussion and conclusions rest on the erroneous position that the ICCPR applies to Guantanamo detainees because, "while United States armed forces continue to be engaged in combat operations in Afghanistan as well as in other countries, they are not currently engaged in an international armed conflict between two Parties to the Third and Fourth Geneva Conventions" (paragraph 26). This is incorrect: the existence of an armed conflict is determined *inter alia* by the intensity, and scope and duration of hostilities, not by whether the situation is afforded Geneva Convention protection. The Report continues: "In the ongoing non-international armed conflicts involving US forces, the *lex*

specialis authorizing detention without respect for the guarantees set forth in article 9 ICCPR therefore can no longer serve as basis for that detention" (id.). This of course is incorrect and leads to a manifestly absurd result: during an ongoing armed conflict, unlawful combatants receive greater procedural rights than would lawful combatants under the Geneva Conventions.

Prisoners of war may be detained until the end of active hostilities, and in recognition of battlefield conditions, investigation and prosecution of combatant detainees is not required unless they are charged with a crime. The Report does not question this well-established precept of international humanitarian law, yet nevertheless assails the United States for applying a similar detention regime to unlawful combatants, who are not eligible for POW status due to their failure to heed the basic law of war. The approach called for by the Report is unprecedented, and indeed would turn international humanitarian law on its head by affording greater protections to unlawful combatants than to lawful ones. This is not, and cannot be, the law. To the contrary, it is the view of the United States Government that we cannot have an international legal system in which honorable soldiers who abide by the law of armed conflict and are captured on the battlefield may be detained and held until the end of a war without access to courts or counsel, but terrorist combatants who violate those very laws must be given special privileges or released and allowed to continue their belligerent or terrorist activities. Such a legal regime would signal to the international community that it is acceptable for armies to behave like terrorists.

V. ONGOING ARMED CONFLICT

As the Special Rapporteurs are aware, on September 11, 2001, the United States was the victim of massive and brutal terrorist attacks carried out by 19 Al Qaida suicide attackers who hijacked and crashed four U.S. commercial jets with passengers on board, two into the World Trade Center towers in New York City, one into the Pentagon near Washington, D.C., and a fourth into a field in Shanksville, Pennsylvania, leaving more than 3000 innocent individuals dead or missing.

The United Nations Security Council condemned the terrorist attacks of September 11, 2001 as a "threat to international peace and security" and recognized the "inherent right of individual and collective self-defence in accordance with the Charter." See U.N. Security Council Resolution 1368, U.N. Doc. No. S/RES/1368 (September 12, 2001); see also U.N. Security Council Resolution 1373, U.N. Doc. No. S/RES/1373 (September 28, 2002), cited in the Report. The North Atlantic Treaty Organization (NATO), the Organization of American States (OAS) under the 1947 Inter-American Treaty of Reciprocal Assistance (Rio Treaty), and Australia under the ANZUS Treaty, similarly considered the terrorist attacks on the United States as an armed attack, justifying action in self-defense. See Statement of Australian Prime Minister on September 14, 2001 (Article IV of ANZUS applies to the 9/11 attacks); Statement of October 2, 2001 by NATO Secretary General Lord Robertson (9/11 attacks regarded as an action covered by Article 5 of the Washington treaty); OAS publication, *United Against Terrorism*, www.oas.org/assembly/GAAssembly2000/Gaterrorism.htm.

On October 7, 2001, President Bush invoked the United States' inherent right of self-defense and, as Commander in Chief of the U.S. Armed Forces, ordered the U.S. Armed Forces to initiate action in self-defense against the terrorists and the Taliban regime that harbored them in Afghanistan. The United States was joined in the operation by the United Kingdom and coalition forces, comprising (as of December 2003) 5,935 international military personnel from 32 countries.

Prior to this, Al Qaida had directed the October 12, 2000 attack on the USS Cole in the port of Aden, Yemen, killing 17 US Navy members and injuring an additional 39. Al Qaida also had orchestrated the bombings in August 1998 of the US Embassies in Kenya and Tanzania that killed at least 300 individuals and injured more than 5,000. *Id.* at 119. Al Qaida additionally claimed to have shot down UN helicopters and killed US servicemen in Somalia in 1993 and to have conducted three bombings that targeted US troops in Aden, Yemen in December 1992. *Id.*

As the foregoing makes clear, the United States Government, and indeed the international community, concluded that Al Qaida and related terrorist networks are in a state of armed conflict with the United States. Al

Qaida trained, equipped, and supported fighters and have planned and executed attacks around the world against the United States on a scale that far exceeds criminal activity. Al Qaida attacks have deliberately targeted civilians and protected sites and objects. For example, in 2002, Al Qaida operatives in northern Iraq concocted suspect chemicals under the direction of senior Al Qaida associate Abu Mu'sab al-Zarqawi and tried to smuggle them into Russia, Western Europe, and the United States for terrorist operations. U.S. Department of State Patterns of Global Terrorism 2002 (publication 11038 April 2003) at p. 79. Other attacks perpetrated by Al Qaida and Al Qaida-linked groups include the attempted bombing on December 22, 2001, of a commercial transatlantic flight from Paris to Miami by convicted shoe bomber Richard Reid; on October 12, 2002, a car bomb outside a nightclub in Bali, Indonesia, killing about 180 international tourists and injuring about 300; a suicide car bombing at a hotel in Mombassa, Kenya, killing 15 and injuring 40; the near-miss SA-7 missile attack on a civilian jet departing Mombassa for Israel; an attack on US military personnel in Kuwait on October 8, 2002, that killed one US soldier and injured another; a suicide attack on the MV Limburg off the coast of Yemen on October 6, 2002, that killed one and injured four; and a firebombing of a synagogue in Tunisia on April 11, 2002 that killed 19 and injured 22. *Id.* at 118-19.

On May 12, 2003, Al Qaida suicide bombers in Saudi Arabia attacked three residential compounds for foreign workers, killing 34, including 10 U.S. citizens, and injuring 139 others. On November 9, 2003, Al Qaida was responsible for the assault and bombing of a housing complex in Riyadh, Saudi Arabia, that killed 17 and injured 100 others. On November 15, 2003, two Al Qaida suicide truck bombs exploded outside the Neve Shalom and Beth Israel Synagogues in Istanbul, killing 20 and wounding 300 more. On November 20, 2003, two Al Qaida suicide truck bombs exploded near the British consulate and the HSBC Bank in Istanbul, killing 30, including the British Consul General, and injuring more than 309. In December 2003, Al Qaida conducted two assassination attempts against Pakistan President Musharraf.

In 2004, the Saudi-based Al Qaida network and associated extremists launched at least 11 attacks, killing more than 60 people, including 6 Americans, and wounding more than 225. Al Qaida primarily focused on targets

associated with U.S. and Western presence and Saudi security forces located in Riyadh, Yanbu, Jeddah, and Dhahran.

In October 2004, Abu Mus'ab al-Zarqawi announced a merger between his organization, Jama'at al-Tawhid was-al-Jihad or JTJ and Usama bin Ladin's Al Qaida. Bin Ladin endorsed Zarqawi as his official emissary in Iraq in December. The new organization, Al Qaida in Iraq or AQI, has the immediate goal of establishing an Islamic state in Iraq. Prior to the merger of the two organizations, Zarqawi's groups had been conducting a number of attacks in Iraq, including the attack responsible for the death of the United Nations Secretary-General's Special Representative for Iraq, Sergio Vierra de Mello.

More recently, Al Qaida has claimed credit for the spectacular July 2005 suicide bomb attacks in London's Underground and bus transport system, which killed 56 and wounded hundreds. The Salafist Group for Call and Combat (GSPC), publicly affiliated with Al Qaida, has been responsible for numerous attacks in Algeria as well as the June 4, 2005 attack against the Mauritanian military post at El Mreiti that killed 14 soldiers and wounded an equal number. Other groups with reported Al Qaida affiliation, including Al Ittihad al Islami (AIAI), have carried out assassinations and other attacks in Somalia and east Africa. An October 1, 2005 triple bombing in Bali killed 22 and injured more than 120, demonstrating continuing threats from the Al Qaida-linked terrorist group Jemaah Islamiya (JI).

As recently as February 2006, Usama Bin Laden threatened a new attack on the United States, a statement contained in a taped recording considered to be authentic.

Al Qaida is also linked to the following plans that were disrupted or not carried out: to assassinate Pope John Paul II during his visit to Manila in late 1994; to kill President Clinton during a visit to the Philippines in early 1995; to bomb in midair a dozen US trans-Pacific flights in 1995; to set off a bomb at Los Angeles International Airport in 1999; and to carry out terrorist operations against US and Israeli tourists visiting Jordan for millennial celebrations in late 1999. (Jordanian authorities thwarted the planned attacks and put 28 suspects on trial.)

In conclusion, it is clear that Al Qaida and its affiliates and supporters have planned and continue to plan and perpetrate armed attacks against the United States and its coalition partners, and they directly target civilians in blatant violation of the law of war. Despite coalition successes in Afghanistan and around the world, the war is far from over. The Al Qaida network today is a multinational enterprise that has a global reach that exceeds that of any previous transnational group. The continuing military operations undertaken against the United States and its nationals by the Al Qaida organization both before and after September 11 necessitate a military response by the armed forces of the United States. To conclude otherwise is to permit an armed group to wage war unlawfully against a sovereign state while precluding that state from using lawful measures to defend itself.

The United States therefore fundamentally disagrees with the statement in the Report that "the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of the applicability of international humanitarian law" (paragraph 23).

During the course of hostilities in Afghanistan, the United States military and its allies have captured or secured the surrender of thousands of individuals fighting as part of the Al Qaida terrorist network or who supported, protected or defended the Al Qaida terrorists. These were individuals captured in connection with the ongoing armed conflict. Their capture and detention were lawful and necessary to prevent them from returning to the battlefield or reengaging in armed conflict.

Examples of detainees held under U.S. Government custody during Operation Enduring Freedom include:

- Terrorists linked to documented Al Qaida attacks on the United States such as the East Africa U.S. embassy bombings and the USS Cole attack.
- Terrorists who taught or received training on arms and explosives, surveillance, and interrogation resistance techniques at Al Qaida camps.
- Terrorists who continue to express their desire to kill Americans if released.
- Terrorists who have sworn personal allegiance to Usama

bin Laden.

- Terrorists linked to several Al Qaida operational plans, including the targeting of U.S. facilities and interests.

Representative examples of specific Guantanamo detainees include:

- An Al Qaida explosives trainer who has provided information on the September 2001 assassination of Northern Alliance leader Masood.
- An individual captured on the battlefield with links to a financier of the September 11th plots and who attempted to enter the United States in August 2001 to meet hijacker Mohammed Atta.
- Two individuals associated with senior Al Qaida members developing remotely detonated explosive devices for use against U.S. forces.
- A member of an Al Qaida supported terrorist cell in Afghanistan that targeted civilians and was responsible for a grenade attack on a foreign journalist's automobile.
- An Al Qaida member who plotted to attack oil tankers in the Persian Gulf.
- An individual who served as a bodyguard for Usama Bin Laden.
- An Al Qaida member who served as an explosives trainer for Al Qaida and designed a prototype shoe bomb and a magnetic mine.
- An individual who trained Al Qaida associates in the use of explosives and worked on a plot to use cell phones to detonate bombs.

VI. *Lex specialis*

The law of armed conflict is the *lex specialis* governing the international law obligations of the United States regarding the status and treatment of persons detained during armed conflict -- a legal principle with which the Report agrees. To be sure, many of the principles of humane treatment found in the law of armed conflict find similar expression in human rights law. Further, some of the principles of the law of armed conflict may be explicated by analogy or by reference to human rights principles. However, similarity of principles in certain respects does not mean identical or controlling

principles, doctrine, or jurisprudence. Professor Theodor Meron, currently the President of the International Criminal Tribunal for the Former Yugoslavia in The Hague, has written:

Not surprisingly, it has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage. *It also permits certain deprivations of personal freedom without convictions in a court of law.*¹

As Professor Meron concludes, "[t]he two systems, human rights and humanitarian norms, are thus distinct...."²

The consequences of conflating the two bodies of law would be dramatic and unprecedented. For instance, application of principles developed in the context of human rights law would allow all enemy combatants detained in armed conflict to have access to courts to challenge their detention. This result is directly at odds with well-settled law of war that would throw the centuries-old, unchallenged practice of detaining enemy combatants into complete disarray.

Indeed, the Inter-American Commission on Human Rights has recognized that international humanitarian law (the law of war) is the *lex specialis* that may govern the issues surrounding Guantanamo detention. As the Inter-American Commission stated:

"In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of the Commission,

¹ Theodor Meron, *The Humanization of Humanitarian Law*, 94 A.J.I.L. 239, 240 (2000) (emphasis added).

² *Id.*

dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*."

Inter-American Commission on Human Rights
Request to the United States for Precautionary
Measures, in Detainees in Guantanamo Bay, Cuba, dated
March 12, 2002, at page 3.

In summary, the law of war applies to the conduct of war and related detention operations. The law of war allows the United States -- and any other country engaged in armed conflict -- to hold enemy combatants without charges or access to counsel for the duration of active hostilities. That is not to say that all detainees will be held until the overall end of hostilities. The United States - not because of any international law obligation - voluntarily has implemented measures to minimize the duration of detention. Our fight against Al Qaida is different from traditional armed conflicts in that it is not a state-to-state conflict, in which there generally is an identifiable conclusion of hostilities, after which each side releases those combatants it has detained. Sensitive to this reality, the United States evaluates each Guantanamo detainee individually, to determine whether he no longer poses a serious danger of returning to hostilities against us. This concept of an individual analysis has some support in historical practices that contemplate parole, as well as releases of enemy combatants held for extended periods, based on individualized determinations that the combatant does not present a continuing threat.

Detention is not an act of punishment but of security and military necessity. It serves the purpose of preventing combatants from continuing to take up arms against the United States. These are the long-standing, applicable rules of the law of war. The Report, in citing exclusively a military order as the basis for Guantanamo detention, wholly and wrongly disregards the applicability of this body of international law. Further the Report disregards or denies that the detainees are being held to prevent them from taking up the fight (see paragraph 23), thus distorting the correct and lawful framework for detention.

VII. TERRITORIAL SCOPE OF ICCPR

The United States reaffirms its long-standing position that the International Covenant on Civil and Political Rights applies only to "individuals within its territory **and** subject to its jurisdiction", ICCPR Article 2(1) (emphasis added), a position supported by the plain text of the convention as well as its negotiating history ("*travaux preparatoire*").

The Vienna Convention on the Law of Treaties³ states the basic rules for the interpretation of treaties. In Article 31(1), it states that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Resort to this fundamental rule of interpretation leads to the inescapable conclusion that the obligations assumed by a State Party to the International Covenant on Civil and Political Rights (Covenant) apply only within the territory of the State Party.

Article 2(1) of the Covenant states that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind." Hence, based on the plain and ordinary meaning of its text, this Article establishes that States Parties are required to ensure the rights in the Covenant only to individuals who are both *within* the territory of a State Party *and* subject to that State Party's sovereign authority.

This evident interpretation was expressed in 1995 by Conrad Harper, the Legal Adviser of the U.S. Department

³ Although the United States has not ratified the Vienna Convention on the Law of Treaties, the Convention is often consulted as a guide to general principles of treaty interpretation. See, e.g., Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 433 (2d Cir.), cert. denied, 534 U.S. 891 (2001); see also Vienna Convention on the Law of Treaties, S. Exec. Doc. L, 92d Cong., 1st Sess. 1, 19 (1971).

of State, in response to a question posed by the UN Committee on Human Rights, as follows:

Mr. HARPER (United States of America) said

. . .

Mr. Klein had asked whether the United States took the view that the Covenant did not apply to government actions outside the United States. The Covenant was not regarded as having extraterritorial application. In general, where the scope of application of a treaty was not specified, it was presumed to apply only within a Party's territory. Article 2 of the Covenant expressly stated that each State Party undertook to respect and ensure the rights recognized "to all individuals within its territory and subject to its jurisdiction". That dual requirement restricted the scope of the Covenant to persons under United States jurisdiction and within United States territory. During the negotiating history, the words "within its territory" had been debated and were added by vote, with the clear understanding that such wording would limit the obligations to within a Party's territory.⁴

A further rule of interpretation contained in the Vienna Convention on the Law of Treaties states in Article 32 that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.

In fact, there is no ambiguity in Article 2(1) of the Covenant, and its text is neither manifestly absurd nor unreasonable. Thus there is no need to resort to the travaux préparatoires of the Covenant to ascertain the

4. *Summary record of the 1405th meeting: United States of America, UN ESCOR Hum. Rts. Comm., 53rd Sess., 1504th mtg. at ¶¶ 7, 20, U.N. Doc. CCPR/C/SR 1405 (1995).*

territorial reach of the Covenant. However, resort to the travaux serves to underscore the intent of the negotiators to limit the territorial reach of obligations of States Parties to the Covenant.

The preparatory work of the Covenant establishes that the reference to "within its territory" was included within Article 2(1) of the Covenant to make clear that states would not be obligated to ensure the rights recognized therein outside their territories.

In 1950, the draft text of Article 2 then under consideration by the Commission on Human Rights would have required that states ensure Covenant rights to everyone "within its jurisdiction." The United States, however, proposed the addition of the requirement that the individual also be "within its territory."⁵ Eleanor Roosevelt, the U.S. representative and then-Chairman of the Commission emphasized that the United States was "particularly anxious" that it not assume "an obligation to ensure the rights recognized in it to citizens of countries under United States occupation."⁶ She explained that:

The purpose of the proposed addition [is] to make it clear that the draft Covenant would apply only to persons within the territory and subject to the jurisdiction of the contracting states. The United States [is] afraid that without such an addition the draft Covenant might be construed as obliging the contracting states to enact legislation concerning persons, who although outside its territory were technically within its jurisdiction for certain purposes. An illustration would be the occupied territories of Germany, Austria and Japan: persons within those countries were subject to the jurisdiction of the occupying

5. Compilation of the Comments of Governments on the Draft International Covenant on Human Rights and on the Proposed Additional Articles, U.N. ESCOR Hum. Rts. Comm., 6th Sess. at 14, UN Doc. E/CN.4/365 (1950) (U.S. proposal). The U.S. amendment added the words "territory and subject to its" before "jurisdiction" in Article 2(1).

6. ⁶Summary Record of the Hundred and Ninety-Third Meeting, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 193rd mtg. at 13, 18, U.N. Doc. E/CN.4/SR.193 at 13, 18 (1950) (Mrs. Roosevelt); Summary Record of the Hundred and Ninety-Fourth Meeting, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 194rd mtg. at 5, 9, U.N. Doc. E/CN.4/SR.194(1950).

states in certain respects, but were outside the scope of legislation of those states. Another illustration would be leased territories; some countries leased certain territories from others for limited purposes, and there might be question of conflicting authority between the lessor nation and the lessee nation.⁷

Several delegations spoke against the U.S. amendment, arguing that a nation should guarantee fundamental rights to its *citizens* abroad as well as at home. René Cassin (France), proposed that the U.S. proposal should be revised in the French text replacing "et" with "ou" so that states would not "lose their jurisdiction over their foreign citizens."⁸ Charles Malik (Lebanon) cited three possible cases in which the United States amendment was open to doubt:

First, . . . [the] amendment conflicted with Article [12], which affirmed the right of a citizen abroad to return to his own country; it might not be possible for him to return if, while abroad, he were not under the jurisdiction of his own government. Secondly, if a national of any state, while abroad were informed of a suit brought against him in his own country, he might be denied the rightful fair hearing because of his residence abroad. Thirdly, there was the question whether a national of a state, while abroad, could be accorded a fair and public hearing in a legal case in the country in which he was resident.⁹

⁷ *Summary Record of the Hundred and Thirty-Eighth Meeting*, U.N. ESCOR Hum. Rts. Comm., 6th Sess., 138th mtg at 10, U.N. Doc. E/CN.4/SR.138 (1950) (emphasis added).

⁸ *Summary Record of the Hundred and Ninety-Third Meeting*, *supra* note 2, at 21. (Mr. René Cassin). Several states maintained similar positions. See, *Summary Record of the Hundred and Ninety-Fourth Meeting*, *supra* note 2, at 5 (Mauro Mendez, representative of Philippines); *Id.* (Alexis Kryou, representative of Greece); *Id.* at 7 (Joseph Nisot, representative of Belgium); *Id.* at 8 (Branko Jevremovic, representative of Yugoslavia)

⁹ *Id.* at 7 (Charles Malik proposed the addition of the words "'in so far as internal laws are applicable' following the U.S. amendment.").

Mrs. Roosevelt in responding to Malik's points, could "see no conflict between the United States' amendment and Article [12]; the terms of Article [12] would naturally apply in all cases."¹⁰ Additionally, she asserted that "any citizen desiring to return to his home country would receive a fair and public hearing in any case brought against him."¹¹ Finally, she reiterated generally that

"it was not possible for any nation to guarantee such rights [e.g., the right to a fair trial in foreign courts] under the terms of the draft Covenant to its nationals resident abroad."¹²

Ultimately, the U.S. amendment was adopted at the 1950 session by a vote of 8-2 with 5 abstentions.¹³ Subsequently, after similar debates, the United States and others defeated French proposals to delete the phrase "within its territory" at both the 1952 session of the Commission¹⁴ and the 1963 session of the General Assembly.¹⁵

¹⁰ *Id.* (Mrs. Roosevelt) ICCPR Article 12(4) provides that "No one shall be arbitrarily deprived of the right to enter his own country."

¹¹ *Summary Record of the Hundred and Ninety-Fourth Meeting, supra* note 2, at 7 (Mrs. Roosevelt)

¹² *Id.* Several states maintained that the United States position was the most sound and logical one. *See, Id.* at 6 (Dr. Carlos Valenzuela, representative of Chile); *Id.* at 8 (E.N. Oribe, representative of Uruguay)

¹³ *Id.* at 11.

¹⁴ *Draft International Convention on Human Rights and Measures of Implementation*, U.N. ESCOR Hum. Rts. Comm., 8th Sess., Agenda Item 4, U.N. Doc. E/CN.4/L.161 (1952) (French amendment); *Summary Record of the Three Hundred and Twenty-Ninth Meeting*, U.N. ESCOR Hum. Rts. Comm., 8th Sess., 329th mtg. at 14, UN Doc. E/CN.4/SR.329 (1952) (vote rejecting amendment). During the debate France and Yugoslavia again urged deletion of the phrase within its territory because states should be required to guarantee Covenant rights to citizens abroad. *Id.* at 13 (P. Juvigny, representative of France); *Id.* at 13 (Branko Jevremovic, representative of Yugoslavia).

¹⁵ U.N. GAOR 3rd Comm., 18th Sess., 1259th mtg. ¶ 30, U.N. Doc. A/C.3/SR.1259 (1963) (rejection of French and Chinese proposal to delete "within its territory"). Several states again maintained that the Covenant should guarantee rights to citizens abroad. *See*, U.N. GAOR 3rd Comm., 18th Sess., 1257th mtg. ¶ 1 UN Doc. A/C.3/SR.1257 (1963) (Mrs. Mantaoulinos, representative of Greece); *Id.* at ¶ 10 (Mr. Capotorti, representative of Italy); *Id.* at ¶ 21 (Mr. Combal, representative of France); U.N. GAOR 3rd Comm., 18th Sess., 1258th mtg. ¶ 29, UN Doc. A/C.3/SR.1258 (1963) (Mr. Cha, representative of China); *Id.* at ¶ 39 (Antonio Belaunde, representative of Peru).

In support of its position that the ICCPR is extra-territorial, the Report cites to a General Comment of the Human Rights Committee and the advisory opinion of the International Court of Justice in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*. These non-binding authorities cannot rewrite the binding obligations undertaken and consented to by States Parties upon ratification of the ICCPR. "Soft law" cannot amend hard law, as much as some might wish it were so.

In short, the ICCPR does not provide the legal rules governing Guantanamo detention and treatment. Derogation in a state of emergency under ICCPR article 4 is not relevant to Guantanamo detention, and ICCPR articles 9 and 14 do not govern the military commissions or CSRT and ARB tribunals, to cite two of the most glaring misstatements in the Report. (Full factual details regarding the operation of military commissions, CSRTs and ARBs are provided in Section X and the attached Annex.) The entire legal framework of the Report is fundamentally erroneous, and the Report collapses under the weight of this error.

VIII. ANTI-TORTURE LAW AND POLICY

The Report raises concerns about conditions of detention and treatment at Guantanamo. Indeed, the United States has taken and continues to take all allegations of abuse very seriously. Specifically, in response to specific complaints of abuse at Guantanamo and in Afghanistan, the Department of Defense has ordered a number of studies that focused, *inter alia*, on detainee operations and interrogation methods to determine if there was merit to the complaints of mistreatment.

Although these extensive investigative reports have identified problems and proffered recommendations, none of them found that any governmental policy directed, encouraged or condoned these abuses. In general, these reports have assisted in identifying and investigating all credible allegations of abuse. When a credible allegation of improper conduct by DoD personnel surfaces, it is reviewed and investigated. As a result of investigation, administrative, disciplinary, or judicial action is taken

as appropriate. Those credible allegations were and are now being resolved within the Combatant Command structure.

The Report raised concerns generated by an August 1, 2002, memorandum prepared by the Office of Legal Counsel (OLC) at the U.S. Department of Justice (DOJ), on the definition of torture and the possible defenses to torture under U.S. law. The Report also expressed concern about a memorandum dated April 16, 2003, reflecting the Secretary of Defense's approval of certain counter resistance techniques, which was based on a DoD Working Group Report on Detainee Interrogations, dated April 4, 2003. The 2002 DOJ OLC memorandum was withdrawn on June 22, 2004 and replaced with a December 30, 2004 memorandum (2004 Justice Department Memorandum) interpreting the legal standards applicable under 18 U.S.C. 2340-2340A, also known as the Federal Torture Statute. On March 17, 2005, the Department of Defense determined that the Report of the Working Group on Detainee Interrogations is to be considered as having no standing in policy, practice, or law to guide any activity of the Department of Defense.

At all times, it has been the unambiguous policy of the United States that U.S. Government personnel not engage in torture. The 2004 Justice Department Memorandum restates "the President's unequivocal directive that United States personnel not engage in torture." As quoted below, the President has made clear that the United States stands against and will not tolerate torture and that the United States remains committed to complying with its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The 2004 Justice Department Memorandum further reaffirms that:

"Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture (the "CAT"); customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President."

Id. at page 1.

Indeed, on United Nations International Day in Support of Victims of Torture, June 26, 2004, the President stated that:

"The United States reaffirms its commitment to the worldwide elimination of torture. . . . To help fulfill this commitment, the United States has joined 135 other nations in ratifying the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction."

"These times of increasing terror challenge the world. Terror organizations challenge our comfort and our principles. The United States will continue to take seriously the need to question terrorists who have information that can save lives. But we will not compromise the rule of law or the values and principles that make us strong. Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere."

The 2004 Justice Department Memorandum explains further:

"Congress enacted sections 2340-2340A to carry out the United States' obligations under the CAT. See H.R. Conf. Rep. No. 103-482, at 229 (1994). The CAT, among other things, obligates state parties to take effective measures to prevent acts of torture in any territory under their jurisdiction, and requires the United States, as a state party, to ensure that acts of torture, along with attempts and complicity to commit such acts, are crimes under U.S. law. See CAT arts. 2, 4-5. Sections 2340-2340A satisfy that requirement with respect to acts committed outside the United States." (Page 4, footnotes omitted).

The recently enacted Detainee Treatment Act codified the policy of the Executive Branch to treat all detainees and conduct all interrogations in a manner consistent with

the prohibition against cruel, inhuman or degrading treatment, as ratified by the United States in the CAT.

On March 10, 2005 Vice Admiral Church (the former U.S. Naval Inspector General) released an executive summary of a report which examined the precise question of "whether DoD had promulgated interrogation policies or guidance that directed, sanctioned or encouraged the abuse of detainees." Church Report, Executive Summary, at 3, released March 10, 2005 (relying upon data available as of September 30, 2005) (at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>) (visited March 9, 2006)). In his Report, he wrote that "this was not the case," *id.*, finding that "it is clear that none of the approved policies - no matter which version the interrogators followed - would have permitted the types of abuse that occurred." *Id.*, at 15. In response to intensive questioning before the U.S. Senate Armed Services Committee as to whether the 2002 DOJ memo or subsequently authorized interrogation practices had contributed to individual soldiers committing abuses, he responded that "clearly there was no policy, written or otherwise, at any level, that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that, in fact, occurred." Transcript at 7. Although Vice Admiral Church's investigation is the most comprehensive to date on this issue, it was consistent with the findings of earlier investigations on this point. See, e.g., Army Inspector General Assessment, released July 2004 (at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.html>) (visited March 9, 2006)).

Subsequent to the release of the December 2004 DOJ Memorandum interpreting the Federal Torture Statute, the Deputy Secretary of Defense ordered a "top-down" review within the Department to ensure that the policies, procedures, directives, regulations, and actions of the Department comply fully with the requirements of the new Justice Department Memorandum.¹⁶ The Office of Detainee Affairs in the Office of the Under Secretary of Defense for Policy coordinates this process of review.

¹⁶ Department of Defense Memorandum (Jan. 27, 2005).

In addition, Standard Operating Procedure in place at Guantanamo since 2004 requires the investigation of any and every allegation of detainee abuse by United States forces. A report of that investigation is provided to the Commander at Guantanamo for further formal investigation or other action if warranted.

The Report of the Special Rapporteurs makes a number of additional legal errors in discussing detention and anti-torture policy. For example, the Report states that all incommunicado detention is prohibited under the Convention Against Torture. This is wrong: there is no binding legal authority for this proposition. The Report persistently seeks to impose obligations on the United States that were explicitly rejected or otherwise could not be achieved in negotiating the terms of the treaty.

IX. NON-REFOULEMENT

A further example of the Report's attempt to impose obligations that have no basis in law is the allegation that Article 7 of the ICCPR prevents renditions and contains a *non-refoulement* obligation (paragraph 55). Again there is no binding legal authority for this proposition. *Non-refoulement* obligations are contained in Article 33 of the Refugee Convention and in Article 3 of the CAT but not in Article 7 of the ICCPR. Inferring a *non-refoulement* obligation in every prohibition a party undertakes by treaty would prevent a State Party to the ICCPR from returning a person to a country that permits arbitrary detention (Article 9), fails to notify the defendant promptly of charges (Article 9), fails to bring a defendant promptly before a judge (Article 9), does not try a defendant without undue delay (Article 14), violates the freedom to choose a residence (Article 12), does not respect freedom of thought, conscience and religion (Article 18), interferes in the right to hold opinions (Article 19), or violates the right of peaceful assembly (Article 21) or freedom of association (Article 22). There is absolutely no basis in international law for imputing a *non-refoulement* obligation into the ICCPR.

In its actions involving the possible repatriation of Guantanamo detainees to other countries, the United States takes seriously the principle of *non-refoulement*. It is U.S. policy not to "expel, return ('refouler') or extradite" individuals to other countries where the United

States believes it is "more likely than not" that they will be tortured. Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, the U.S. policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. The United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored. Further, if a case were to arise in which the assurances the United States has obtained from another government are not sufficient when balanced against an individual's specific claim, the United States would not transfer a detainee to the control of that government unless those protection concerns were satisfactorily resolved.

X. FACTUAL ERRORS

This section addresses many of the numerous factual errors found in Sections II through V of the Report. It also addresses areas in which the mandate holders failed to note (or selectively noted) the extensive factual information provided to them by the United States in October 2005¹⁷ and, in places, widely available public information.¹⁸ These failures to incorporate relevant information often create a misleading picture of the actual situation at Guantanamo. They also unfortunately cast doubt on the method of work used in preparing the Report and on its conclusions.

ERRORS IN SECTION II

(Arbitrary Detention and Independence of Judges and Lawyers)

Quite apart from the legal errors that result from its erroneous characterization of the international law framework applicable to detention at Guantanamo, the Report makes a number of factual errors in its description of the status of habeas corpus proceedings, the Administrative

¹⁷ Response of the United States of America Dated October 21, 2005 to Inquiry of the UNCHR Special Rapporteurs Dated August 8, 2005 Pertaining to Detainees at Guantanamo Bay (attached as an Annex to this Reply).

¹⁸ For example, the inexplicable failure to include adequate reference to the Detainee Treatment Act of 2005, discussed below.

Review Board (ARB) and Combatant Status Review Tribunal (CSRT) processes, and the military commissions.

Errors Related to the Status of Habeas Corpus Proceedings (Paragraph 27)

Assertion: *"[A]t the time of writing (i.e. more than four years after detention at Guantánamo Bay started), not a single habeas corpus petition has been decided on the merits by a United States Federal Court."*

This assertion does not take into account various habeas corpus petitions that were decided on the merits by federal District Court. See, e.g., Khalid v. Bush, Boumediene v. Bush, 355 F.Supp.2d 311 (D.D.C. 2005) (Judge Leon); and Qassim v. Bush, 407 F. Supp. 2d 198 (D.D.C. 2005) (Judge Robertson). These decisions are now on appeal to the United States Court of Appeals for the District of Columbia Circuit.

Additionally, many habeas cases are currently in abeyance pending the outcome of Hamdan v. Rumsfeld, which will be heard by the U.S. Supreme Court on March 28, 2006.

Errors Related to CSRT and ARB Processes (Paragraphs 28-29)

Assertion: *"The CSRTs and ARBs do not comprise the guarantees of independence essential to the notions of a 'court' or 'exercise of judicial power.'"*

It is obvious that CSRTs and ARBs are not courts and do not entail the exercise of judicial power. To assert that they are courts engaged in the exercise of judicial power belies a fundamental lack of understanding that ignores the extensive factual information about these processes provided to the Special Rapporteurs and available to the public at large.

Contrary to the assertion, the CSRT and ARB processes do incorporate guarantees of independence. For example, CSRTs and ARBs are composed of neutral commissioned officers who are sworn to execute their duties impartially. Their findings are also reviewed by independent legal officers.

Assertion: *"Detainees' defence counsel whom the mandate holders met raised serious concerns regarding CSRT and ARB*

procedural rules, which do not provide the detainees with a defence counsel."

These assertions by defense counsel ignore the fact that both CSRT and ARB procedures provide detainees with assistance that goes beyond that traditionally afforded to detainees under the law of armed conflict.

For example, CSRT procedures provide the detainee with a personal representative to assist in reviewing information and preparing the detainee's case, presenting information, and questioning witnesses at the CSRT. This goes beyond what is provided in an Article 5 proceeding under the Third Geneva Convention.

The availability of assistance during ARB proceedings, which are themselves unprecedented in the history of warfare, is also extensive. The detainee is provided with a military officer to provide assistance throughout the ARB process. In addition, in advance of ARB proceedings, the U.S. government solicits information from the detainee's government of nationality and, through that government, from the detainee's relatives and any other relevant parties. The ARB will accept any such information as well as information from outside counsel representing detainees in habeas corpus proceedings.

Assertion: *"The interviews conducted by the mandate holders with detainees corroborated allegations that the purpose of the detention of most of the detainees is not to bring criminal charges against them but to extract information from them on other terrorism suspects."*

Contrary to the assertion, detainees are held for a very practical reason: to prevent them from returning to the fight. The potential for enemy combatants to return to the fight is why the law of war permits their detention until the end of an armed conflict.

However, since the United States has no interest in detaining enemy combatants any longer than necessary, it has released or transferred 267 detainees prior to the end of the armed conflict. This is a significant departure from past wartime practices.

Unfortunately, despite assurances from those released, it is believed that at least a dozen, and possibly more,

have gone back to fighting. One such released detainee, Abdullah Mahsud, claimed he was an office clerk and driver for the Taliban and consistently denied any affiliation with Al Qaida. He said he was forced into the Taliban military and had not received any weapons or military training. After his release, it was reported that he ordered the kidnapping by Al Qaida-linked militants of two Chinese engineers. Another released detainee recently assassinated an Afghan judge.

Assertion: *"Even where the CSRT determines that the detainee is not an 'enemy combatant' and should no longer be held, as in the case of the Uighurs held at Guantánamo Bay nine months after the CSRT determined that they should be freed, release might not ensue."*

As stated above, the United States has no interest in detaining enemy combatants any longer than necessary and has transferred or released 267 detainees. However, in some situations, it has been difficult to find locations to which to transfer safely detainees from Guantanamo when they do not want to return to their country of nationality, their nationality cannot be confirmed, or they have expressed reasonable fears of return.

In addition, U.S. policy is not to transfer a person to a country if the United States determines that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. In appropriate cases, the United States may obtain specific assurances that the country of return will not torture an individual being returned. The essential question in evaluating foreign government assurances is whether the competent U.S. Government officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred. If a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved. Circumstances have arisen in the past where the United States has decided not to transfer detainees to their country of origin because of torture concerns.

As a practical matter, until the United States can find a suitable location for the safe release of a detainee in the above situations, the only alternative is for the detainee to remain in U.S. control.

Assertion: *"[T]he jurisdiction of the Court of Appeals [for the District of Columbia under the Detainee Treatment Act of 2005] only extends to examining whether the procedures were properly followed, and not to the merits of the CSRT decision."*

This assertion addresses the relevant section of the Detainee Treatment Act of 2005 in an incomplete manner. In fact, according to that Act, the jurisdiction of the United States Court of Appeals for the District of Columbia is to determine:

whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and

to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.¹⁹

As can be seen, the Report fails even to mention the second part.

Errors Related to Military Commissions (Paragraphs 30-40)

Assertion: *"According to the military order, the judges of the commissions are appointed by the 'Appointing Authority', which is under the authority and the responsibility of the Department of Defense and ultimately of the President. Judges should be commissioned officers of the armed forces and may be removed by the Appointing Authority. Such provisions suggest not only interference by*

¹⁹ Detainee Treatment Act of 2005, H.R. 2863, Title X, Sections 1005(e)(2)(C)(i) and (ii).

but full control over the commissions' judges by the executive: the requirement of an independent judiciary is clearly violated."

Military commissions, although established under law by the Executive, are neither directed nor interfered with by the Executive. The Appointing Authority and presiding officers act independently at all times. The Appointing Authority does not supervise, direct, or guide the presiding officers.

Assertion: *"[T]he Military Order requires only a minimum level of legal knowledge for appointment to the commissions. The inadequate qualifications of the members impede the regular and fair conduct of the hearings, violating the essential requirement that 'persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law'."*

Section 4(A)(4) of Military Commission Order No. 1 provides that each presiding officer in a military commission shall be a judge advocate of one of the armed services. All judge advocates of the armed services are fully qualified attorneys. Furthermore, each of the four presiding officers appointed to date in military commissions are not only attorneys but also highly qualified and experienced military judges. Section 4(A)(5) of Military Commission Order No. 1, as revised on August 31, 2005, provides that the presiding officer shall rule upon all questions of law arising during the proceedings.

The members of military commissions who are not designated as presiding officers are not "judicial officers" in the context of the "Basic Principles on the Independence of the Judiciary," as cited in the Report but, rather, adjudicators of fact. Adjudicators of fact in jury trials in the U.S. legal system, both in civil and military trials by courts-martial, are not required to have legal training. Likewise, such members do not have primary responsibility for legal rulings and are again not required to have legal training.

Assertion: *"The Military Order limits the right to be tried in one's presence."*

The accused is afforded the opportunity to be present at all trial sessions except when such presence would threaten national security or violate a security interest of a witness. By regulation the Accused's absence from the trial may not interfere with the right to a full and fair trial. Further, to ensure a fair trial during military commissions, an Accused's detailed military counsel will be present at all proceedings.

Assertion: *"[T]he right of the accused to defend himself in person or through legal assistance of his own choosing is violated since the Military Commissions provide for the appointment of a defense counsel directly by the Appointing Authority, and for the possibility of his/her removal by the same authority for "'good reason.'"*

Contrary to this assertion, the Chief Defense Counsel, not the Appointing Authority, details the counsel for the accused. Chief Defense Counsel and detailed counsel are not rated by the Appointing Authority. The accused may request other military counsel, but they must be reasonably available. The accused may also retain, at no expense to the government, any civilian attorney or foreign attorney consultant, provided they meet the requirements of military commission rules. Access to classified information by this attorney will be determined by the Presiding Officer, in accordance with military commission rules and regulations.

Assertion: *"The right adequately to prepare one's defence (ICCPR, art. 14(3) (b) and the Basic Principles on the Role of Lawyers), which includes access to documents and other evidence and to examine witnesses against oneself and have witnesses examined on one's behalf is not guaranteed, since the Military Order provides that '[t]he Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer'. The grounds for denying the accused and the defence counsel of his choice access to 'protected information' remain excessively broad also under Revised Military Commission Order No. 1 of August 2005, which brought some improvement to the Military Order of March 2002 in this respect."*

As an initial matter and as explained at length earlier in this Reply, as well as in reports submitted by the United States pursuant to the ICCPR, the ICCPR does not govern detention and operations at Guantanamo.

In any event, the Presiding Officer's overarching responsibility is to ensure the accused receives a full and fair trial. This includes facilitating the discovery process for both the prosecution and defense. The accused is afforded discovery process and access to evidence to the extent necessary and reasonably available as determined by the presiding officer, in accordance with Section 5(H) of Military Commission Order No. 1.

The prosecution is required to provide the defense with access to evidence known to the prosecution that tends to exculpate the accused, in accordance with Section 5(D) of Military Commission Order No. 1. The Prosecution is also required to provide the defense with access to evidence the Prosecution intends to introduce at trial. An accused's denial of access to protected information is strictly governed and limited; no evidence may be admitted against an accused unless this evidence has been provided to the accused's detailed military counsel. The Presiding Officer may withhold an accused's access to protected information only if a full and fair trial is otherwise provided. Counsel are provided full and extensive support, including but not limited to support material and personnel, translators, interpreters, investigative support, and funding.

Assertion: *"The vast majority of the Guantánamo detainees have not been charged with an offence after several years of detention. As they continue to be detained, the detainees' right to be tried without undue delay is being violated."*

In accordance with the laws of war, detainees may be held until the end of active hostilities. Uncharged detainees are being held for reasons unrelated to trial by military commission. In the case of those detainees who have been charged, it is worth noting that delays of up to six years (from date of detention) of prosecution of war crimes in other international tribunals have been held not to constitute undue delay. Also, those detainees who have been so charged are being held for an additional reason - to prevent them from returning to the battlefield, a justification that does not expire until the end of hostilities under the laws of war. Moreover, the post-charging delays to date in several cases have been caused

by counsel for the detainees who obtained stay orders in U.S. District Court.

Assertion: *"Concerning the right to a public hearing, the Military Order authorizes the court, for unspecified 'national security' reasons, to conduct trials in secret."*

The names of accused, nature of charges, names of Presiding Officers, court dates, and all court filings admitted into evidence are public record. The verdict and, if applicable, sentence will be read in open court. All proceedings are open to the public to the maximum extent practicable.

Grounds for closure include protection of classified information, information protected by law or rule from unauthorized disclosure, the physical safety of Commission participants, and to protect national security interests.

In order to ensure a fair trial during military commissions, the Accused will have detailed military counsel present at all proceedings, including closed proceedings.

Assertion: *"The right to an appeal before an independent tribunal, enshrined in article 14 (5) of ICCPR, is consequently also severely restricted."*

As an initial matter and as explained at length earlier in this Reply, as well as in reports submitted by the United States pursuant to the ICCPR, the ICCPR does not govern detention and operations at Guantanamo.

There are multiple levels of review before the President approves any sentence, including a Review Panel of distinguished lawyers, many with significant civil judicial experience. Also, as the Report recognizes, under the Detainee Treatment Act of 2005, those accused adjudged guilty and sentenced to 10 years or more by military commissions may file, as a matter of right, for review by the United States Court of Appeals for the District of Columbia Circuit. Those accused sentenced to under 10 years may request a discretionary review by the same Court.

ERRORS IN SECTION III

(Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)

Apart from the questionable legal conclusions in this section discussed above, this section contains a number of factual errors, including particularly egregious errors in attributing sources, that raise questions about the work method used in preparing the Report and on the reliability of the Report's conclusions. Moreover, the Report failed to take into account information provided to it in the United States Reply to the 45 Questions of the Special Rapporteurs (attached as an Annex) and otherwise about the number of independent investigations into abuse at Guantanamo. This failure is difficult to explain since the investigations are referred to elsewhere in the Report.

Allegations in paragraph 54 of this section regarding allegedly excessive violence in the treatment of hunger strikers are addressed below as part of the discussion of Section V of the Report ("The Right to the Highest Attainable Standard of Health").

Errors Related to Approved Interrogation Techniques
(Paragraph 50)

The Report purports to quote from a list of techniques approved by the Secretary of Defense in a memorandum dated April 16, 2003 and claims these techniques "remain in force." In this regard, the Report makes two critical errors: (1) it misquotes the April 16, 2003 memorandum and (2) it fails to take into account the provisions of the Detainee Treatment Act of 2005 related to Department of Defense interrogation techniques.

First, the quotation purportedly from the April 16, 2003 memorandum by the Secretary of Defense does not correspond to the language of the actual memorandum, which the Department of Defense made publicly available on June 22, 2004.²⁰

In the case of at least two interrogation techniques, the inexplicable misquotations are material in that they incorrectly portray the authorized interrogation practices.

²⁰ Memorandum for the Commander, US Southern Command (April 16, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf>

Most egregiously, the Report describes the "Change of Scenery" technique as follows: "might include exposure to extreme temperatures and deprivation of light and auditory stimuli." In fact, the approved technique is actually described as "[r]emoving the detainee from the standard interrogation setting and placing him in setting that may be less comfortable; would not constitute a substantial change in environmental quality" (emphasis added). The Report's misquoted language is obviously divergent from that in the actual memorandum and gives an entirely inaccurate impression of what was in reality approved. This error is particularly significant in light of the fact that the Report goes on to make the point that prolonged exposure to extreme temperatures "can conceivably cause severe suffering."

The Report contains a similarly serious error when it characterizes the definition of "Incentive/Removal Technique" as "i.e., comfort items." In fact, the approved memorandum describes this technique as follows: "[p]roviding a reward or removing privilege, above and beyond those that are required by the Geneva Convention, from detainees." The memorandum continues with the following cautionary note:

Caution: Other nations that believe that detainees are entitled to POW protections may consider that provision and retention of religious items (e.g., the Koran) are protected under international law (see, Geneva III, Article 34). Although the provisions of the Geneva Convention are not applicable to the interrogation of unlawful combatants, consideration should be given to these views prior to application of the technique.

The Report therefore fails to include a crucial limitation on the technique: interrogations may not remove privileges referred to in the Third Geneva Convention. Thus, contrary to what the Report suggests, any "comfort items" referred to in the Third Geneva Convention were not be affected by this interrogation technique. Moreover, the Report omits the important caveat on religious items, which is indeed in line with the consistent policy of the United States to respect the religious practices of detainees.

As a result of these significant failures, the Report gives a very misleading impression of the authorized techniques in force at Guantanamo.

The United States considers these misstatements particularly unfortunate and irresponsible because they give readers of the Report the mistaken impression that the misquoted techniques were authorized by the Secretary of Defense and indeed "remain in force" since 2003. The truth is that the misquoted techniques are not authorized.

Finally, the Report fails to note that the Detainee Treatment Act of 2005 contains the following provision:

No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.²¹

On December 30, 2005, the Deputy Secretary of Defense issued a Memorandum to the Combatant Commanders notifying them of the provisions of the Detainee Treatment Act of 2005. That memorandum was forwarded to the Commander, JTF-GTMO and required acknowledgement that operations at JTF-GTMO complied with provisions of the Detainee Treatment Act. That acknowledgement was provided by the Commander, JTF-GTMO and continues to be true.

As a result of the Act, the interrogation techniques authorized by and listed in the United States Army Field Manual on Intelligence Interrogation (also referred to as Field Manual 34-52), not the list in the April 16, 2003 memorandum of the Secretary of Defense, are the current interrogation techniques in force in all theatres worldwide, including at Guantanamo.

The failure to take into account the Detainee Treatment Act of 2005 is inexcusable because that legislation, which received very significant media coverage in the United States and worldwide, was signed by President Bush on December 30, 2005, a full six weeks before the Report was issued.

²¹ *Id.*, Section 1002.

Inappropriate Citation of Primary Sources (Paragraph 54)

Similarly questionable citation practices can be found elsewhere in this section: for example, the Report uses certain "photo and video material" as evidence of treatment that "amounts to torture."

The citation for the "photo material" in the Report is to what appears to be a private web site of unknown credibility entitled "thememoryhole.org." That site features four examples of what it describes as "Leaked Photos of 'Detainees' Being Transported to Guantanamo Bay." The site does not identify the origin of the photographs beyond noting other press reports that the photos were leaked by an anonymous person. Even assuming that the photographs are accurate (which is impossible to determine), they do not show "beating, kicking, [and] punching" as the Report claims. Two of the photographs do show detainees wearing earphones, as the Report notes, but it is crucial to note one of these photographs also shows U.S. military personnel wearing the same earphones. This suggests that the use of this equipment in this context was to protect hearing inside the transport plane, not to inflict "severe pain or suffering," as the Report suggests.

Also as a result of these unclear citation practices, it is difficult to determine what "video material" is referred to in this paragraph of the Report. The Report provides a citation to a Human Rights Watch report that in turn cites to an Associated Press article describing certain video footage of alleged abuses by "Immediate Reaction Forces" (IRFs). Since there is no citation to the actual video footage in the Report or in the sources cited, it is not clear whether the Special Rapporteur actually reviewed the video to confirm that it depicted what the Report asserts it does or whether he instead relied upon this second-hand reporting. In either case, this raises questions about the Report's conclusion that the conduct therein amounts to torture, and, in fact, IRFs are not permitted to engage in acts of torture or detainee abuse. In addition, the imprecise method of citation evident in all the examples above can only cast doubt on the work method used in preparing the Report.

Errors Regarding Detainee Transfer (paragraph 55)

United States policies related to the transfer of detainees have been described in detail in information provided to the mandate holders.

As stated in that information and once again above, U.S. policy is not to transfer a person to a country if the United States determines that it is more likely than not that the person will be tortured or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. In appropriate cases, the United States may obtain specific assurances that the country of return will not torture an individual being returned. The essential question in evaluating foreign government assurances is whether the competent U.S. Government officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred.

If a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United States would not transfer a detainee to the control of that government unless the concerns were satisfactorily resolved. Circumstances have arisen in the past where the United States has decided not to transfer detainees to their country of origin because of torture concerns.

Errors Related to Investigations at Guantanamo (paragraph 56)

Assertion: *"The Special Rapporteur takes the view that the lack of any independent investigation into the various allegations of torture and ill-treatment at Guantanamo Bay amount to a violation of the obligations of the United States under articles 12 and 13 of the Convention Against Torture."*

This assertion fails to take into account a number of reviews and investigations, including by the high-level Independent Panel to Review DoD Detainee Operations, chaired by former Secretary of Defense James R. Schlesinger,²² the Army Inspector General,²³ Naval Inspector

²² Available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>

²³ Available at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.html>

General,²⁴ and Commander of the U.S. Army Medical Research and Materiel Command²⁵ as well as an Army investigation into Federal Bureau of Investigation allegations.²⁶

These reviews have focused on all aspects of detention operations - from the point of capture to theatre-level detention facility operations. These reviews were in no way influenced by the Department of Defense or the Executive Branch. As Secretary of Defense Donald H. Rumsfeld has said on numerous occasions and in numerous venues with respect to the investigations, DoD policy was "to let the chips fall where they may." This fact was affirmed by former Secretary of Defense James R. Schlesinger in the presentation of his panel's report into detention operations.²⁷

This substantial omission is difficult to explain since the United States provided detailed information about these investigations to the mandate holders in October 2005.²⁸ As this detailed information shows and contrary to the assertion in the Report, the United States has taken and continues to take all credible allegations of abuse very seriously. It has ordered and will continue to order independent investigations, as appropriate, to determine if there is merit to such allegations. The United States has taken and will continue to take appropriate action in response to these investigations.

ERRORS IN SECTION IV

(Freedom of Religion or Belief and Religious Intolerance)

This section also contained a number of factual errors and instances in which the Report omits relevant information provided to the mandate holders, thus in places causing potentially misleading impressions.

Inaccurate Citation of Approved Interrogation Techniques (Paragraph 61)

²⁴ Available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>

²⁵ Available at <http://www.armymedicine.army.mil/news/detmedopsrprt/detmedopsrprt.cfm>

²⁶ Available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>

²⁷ Available at <http://www.defenselink.mil/transcripts/2004/tr20040824-secdef1221.html>

²⁸ See Response of the United States of America Dated October 21, 2005 to Inquiry of the UNCHR Special Rapporteurs Dated August 8, 2005 Pertaining to Detainees at Guantanamo Bay at 29-36.

Assertion: *"The list of officially approved interrogation techniques in force today allows for the removal of religious items (e.g. the Holy Koran)."*

This assertion is suspect because it relies on the same erroneous and misleading citation of approved interrogation techniques made in paragraph 50 of the Report.

Detainees have not been denied religious items for interrogation purposes. No interrogator has the authority to utilize religious items for interrogation purposes.

Incomplete Characterization of Information Provided on United States Investigations into Allegations of Koran Mishandling (Paragraph 62)

In discussing the detailed information provided by the United States about investigations into allegations of Koran mishandling, the Report focuses on the five confirmed incidents of mishandling but fails to mention any other information provided by the United States, most notably the strong statement that mishandling of the Koran is never condoned. Moreover, the Report fails to place these five unfortunate but isolated incidents in their broader context. As the information provided made clear, it is important to note that a great number of copies of the Koran (more than 1,600 in at least five languages) have been distributed as part of a concerted effort by the United States to facilitate the desires of detainees to freely worship and that the small number of very regrettable incidents should be seen in light of the volume of efforts to facilitate free religious practice.

Error Related to United States Respect for Islam (Paragraph 65)

Assertion: "[T]here are also concerns about reports that the United States Government has, either implicitly or explicitly, encouraged or tolerated the association of between Islam and terrorism."

The United States does not encourage or tolerate the association of Islam and terrorism. President Bush has clearly stated the United States view on this matter as follows: "[a]s we work together to defeat the terrorists,

we must be very clear about the enemies we face. The killers who take the lives of innocent men, women, and children are followers of a violent ideology *very different from the religion of Islam*. These extremists distort the idea of jihad into a call for terrorist murder against anyone who does not share their radical vision, including Muslims from other traditions, who they regard as heretics."²⁹

ERRORS IN SECTION V
(The Right to the Highest Attainable Standard of Health)

The United States is particularly disappointed by some of the serious and unfounded allegations contained in this section of the Report. Before replying to some of the more glaring inaccuracies, the United States considers it important to provide more detailed information on the measures taken to ensure adequate medical care provided to detainees at Guantanamo.

The Department of Defense recognizes that medical care is an important part of ensuring the safe and humane detention of individuals under its custody. The medical care provided at Guantanamo meets or exceeds any medical care that would be found in the detainees' home countries. It also meets or exceeds the medical care standard for much of the world, including the standard of care provided to incarcerated populations. It also meets or exceeds the medical care provided to members of the United States Armed Forces. The lives of dozens of detainees have been saved by superior medical treatment provided by U.S. military personnel.

Applicable Policy on Medical Care for Detainees

Department of Defense policy on medical care for detainees is set forth in Assistant Secretary of Defense (Health Affairs) Policy 05-006, Medical Program Principles and Procedures for the Protection and Treatment of Detainees in the Custody of the Armed Forces of the United States), dated June 3, 2005 (hereinafter "DoD Medical Policy").³⁰ This policy, applicable to Department of

²⁹ President Hosts Iftaar Dinner, October 17, 2005, available at <http://www.whitehouse.gov/news/releases/2005/10/20051017-5.html> (emphasis added).

³⁰ Available at <http://www.ha.osd.mil/policies/2005/05-006.pdf>.

Defense operations worldwide and issued as a "reaffirmation" of the Department's responsibilities, includes a number of provisions pertinent to matters addressed in the Report. Policies and procedures at Guantanamo and all care provided there are fully in accord with this policy.

Access to Medical Care for Guantanamo Detainees

Detainee hospital statistics show an average of more than 2500 clinic, sick call, or specialty visits per month for a detainee population of about 500. Medical services are available 24 hours a day, 7 days a week by a corps staff currently consisting of 7 physicians, 17 nurses, and 83 corpsman. Any detainee can request medical care at any time by making a request to a guard or to medical personnel who make rounds on the cellblock every other day.

The facility at Guantanamo features an outpatient clinic, an inpatient detention hospital, and an inpatient behavioral health unit structured much like any other Department of Defense medical facility. When the medical professionals who staff these facilities are not deployed to Guantanamo, they provide care to United States service members, their families, and retirees. Full ancillary services are also available, including laboratory, radiology, and pharmacy services. In addition, supplemental services are available at the Naval Base Hospital including an Acute Care Unit dedicated to the treatment of detainees.

All specialty care (including cardiology, gastroenterology, dermatology and others) is available on a routinely or on an emergency basis if needed. Over the past 12 months, 17 specialty clinics have been conducted for the detainees. In support of unexpected medical needs, augmentation staff can be readily mobilized. During the recent hunger strike, for example, two teams totaling 6 physicians, 11 nurses, one dietician, one physical therapist, and 25 corpsman/technicians aided in delivery over 400 feedings without a complication.

Behavior health services are available for the approximately 22% of detainees with a mental health diagnosis. Currently, this service is actively following and treating 8% of the detainee population.

The dental service has seen 322 visits since November 2005 and completed 168 treatment plans, including 35 cleanings, 91 cavities filled, 36 root canals and 6 oral surgeries. The remaining dental treatment plans are in progress.

Scope of Care for Guantanamo Detainees

Since 2002 there have been 275 surgical cases or procedures. Initial cases were predominately orthopedic to repair battlefield injuries or remove shrapnel. Recent cases are focused predominately on hernia repairs, occasional appendectomies, and tonsillectomy or hemorrhoid removal. There has been one total thymectomy for a malignant thymoma and placement of cardiac stents in another patient.

General medical problems among the detainees, whose ages range from the 20's to the mid 60's, are followed using the same guidelines as in a military treatment facility. For example, some of the medical conditions currently being monitored include cardiac disease (7 cases), hypertension (12 cases), diabetes (8 cases), and gastrointestinal disorders (30 cases).

Physical therapy averages 7 patients per day in support of rehabilitation for battlefield injuries or prosthetic care/training. There have been 22 prosthetic appliances provided to the detainees since 2002.

Behavioral health services are available for the approximately 22% of detainees with a mental health diagnosis. Currently, this service is actively following and treating 8% of the detainee population and is staffed with a board certified psychiatrist and psychologist.

Full scope eye care is made available to all detainees. Optometry delivers primary eye care and averages 45 routine exams per month and has dispensed 174 pairs of eyeglasses over the last year. Ophthalmology is available for surgical eye care when needed.

Preventative Medical Care for Guantanamo Detainees

Twelve colonoscopies have been performed as part of colon-cancer screening where age appropriate.

The following immunizations recommended by the Centers for Disease Control have been offered to this group of detainees, whose immunization status has generally been poor:

Diphtheria and Tetanus series:	98%	completed
Measles, Mumps & Rubella:	100%	completed
Hepatitis A & B series	86%	completed
Influenza vaccine:	32%	completed
Annual PPD monitoring:	38%	completed

Relevant Reviews and Investigations

As noted above, Department of Defense entities have conducted a number of very extensive investigations and reviews of detainee policies and operations, including into medical procedures. One of the investigations, directed by the Secretary of Defense and conducted by Vice Admiral Albert T. Church, U.S. Navy, the Naval Inspector General ("Church report"), was a comprehensive review of Department of Defense interrogation operations. An extensive medical system review was conducted by Major General Lester Martinez-Lopez, Medical Corps, U.S. Army, Commander, U.S. Army Medical Research and Materiel Command ("Martinez-Lopez report"), at the direction of the Army Surgeon General. Both reviews inquired into medical procedures at Guantanamo and included full access to all documents, records and personnel relating to detainee medical care and records maintenance.

The Church report, which was presented in March 2005, found that "access to medical information was carefully controlled at GTMO" and that medical personnel "understood their responsibility to provide humane medical care to detainees, in accordance with U.S. military medical doctrine and the Geneva Conventions."

The Martinez-Lopez report, which was presented in May 2005, more directly assesses detainee medical care in the various operational venues, including at Guantanamo. According to the Executive Summary of the report, the assessment team "found a dedicated and committed cadre of medical personnel whose goal and desire were to provide high quality healthcare to each patient they treated, regardless of status."

This report also concluded that the Guantanamo facility "had well-defined detainee medical policies that have been in place since 2003" and that "100% of the interviewed personnel were aware of the policies"; that medical personnel interviewed "were vigilant in reporting actual or suspected detainee abuse to their medical supervisor, chain of command or CID [Criminal Investigation Division]"; that the "overall level of outpatient and inpatient detainee medical care is extremely high"; and that detainee "medical records are extremely complete, and mirror U.S. medical records."

In light of this information, a variety of factual errors and misstatements of medical policy at Guantanamo contained in the Report must be addressed.

Improper Allegations of Conditioning of Medical Care
(Paragraph 70)

Assertion: *"[P]rovision of health care has been conditioned on cooperation with Interrogators."*

This assertion, unsubstantiated in the Report, fails to recognize that the DoD Medical Policy clearly prohibits conditioning needed health care on cooperation with interrogators. A fundamental principle adopted in the policy states: "It is a contravention of DoD policy for health care personnel to be involved in any professional provider-patient relationship with detainees the purpose of which is not solely to evaluate, protect, or improve their physical and mental health."

Inaccurate Allegations of Inadequate Health Care (Paragraph 70)

Assertion: *"[H]ealth care has been denied, unreasonably delayed and inadequate."*

The extensive information provided above should speak for itself in countering this unreasonable assertion. Moreover, the DoD Medical Policy states: "Health care personnel charged with the medical care of detainees have a duty to protect their physical and mental health and provide appropriate treatment for disease. To the extent practicable, treatment of detainees should be guided by professional judgments and standards similar to those that

would be applied to personnel of the U.S. Armed Forces."

Brief Account of Mental Health Lacks Broader Context
(Paragraph 73)

Although it is true that a number of detainees do suffer from significant mental illnesses, a more balanced account than that in the Report would have noted that the prevalence of such illnesses at Guantanamo is not unlike the prevalence of these illnesses in other correctional settings. As noted above, a multi-disciplinary behavioral health service is in place and actively engaged in providing assessments and treatment for detainees as appropriate.

Inaccurate Assertions about Medical Participation in
Interrogations (Paragraph 75)

Assertion: *Medical professionals "systematically violated widely accepted ethical standards...by participating in, providing advice for or being present during interrogation."*

No one who renders medical treatment, including members of the Behavioral Health Services Department, assists with, participates in, or is otherwise involved with the interrogation of detainees. In fact, there are procedures that specifically prohibit any clinical care providers from participation in interrogations. If interrogators become aware of any medical condition of the detainee, that information is forwarded to medical staff and used to provide more comprehensive medical care for the detainee. There is no relationship between the cooperation of a detainee and access to health services. All detainees receive care only as medically indicated.

Inaccurate Assertions about Use of Medical Records for
Interrogation Purposes (Paragraph 75)

Assertion: Medical personnel have "systematically violated widely accepted ethical standards by...breaching confidentiality by sharing medical records or otherwise disclosing health information for purposes of interrogation."

This allegation is just as false. The DoD Medical Policy addresses disclosures of medical information in a

manner analogous to legal standards applicable to U.S. citizens. See HIPAA Privacy Rule, 45 CFR 164.512(f), (j), (k)(2), and (k)(5)). The policy also requires recording of all such disclosures and provides for review if there is suspicion that medical information may be misused. One context of necessary disclosures of medical information relates to the DoD policy that disallows interrogation of detainees who are sick. As in all U.S. prisons, clinics must report to prison authorities when prisoners visiting or asking to visit sick call have conditions that prevent or limit their participation in regular activities, as well as when prisoner representations of ill health are not supported by medical evidence.

Inaccurate Assertions Regarding Response to Hunger Strikes
(Paragraphs 54, 79-82)

In its summary characterizations of the response to the hunger strikes at Guantanamo, the Report fails to take note of the fundamental focus of Department of Defense policy on the prevention of loss of life through standard medical intervention using means that are clinically appropriate, humane, and in accordance with all applicable laws and procedures and medical ethics. The focus at Guantanamo is safe, humane, care and custody of all detainees.

Medical professionals provide regular and detailed warnings to detainees concerning the dangers of failure to eat or drink. All efforts are being made by medical personnel to counsel detainees to end the strike, including by making detainees aware that continuation of the hunger strike could endanger their health or life. The Department of Defense has brought in medical specialists, including nutritionists and behavioral health professionals to increase monitoring or provide any specialized care.

Only when previous protocols failed to eliminate the threat to the health of the detainees did dedicated medical professionals conduct involuntary feedings in a careful, compassionate, and humane manner using a U.S. Federal Bureau of Prisons' model for feeding hunger strikers. In this regard, it should be noted that the declarations of the World Medical Association and other international *standards* cited in the Report, while entitled to careful analysis, do not constitute the applicable law. Department of Defense policy prioritizes the overriding

obligation to protect human life against other potential ethics concerns.

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DRL/MLA - Julieta Noyes - ok
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S/CT - John Sandage (section V)- ok
S/P - Matt Waxman - ok (subs)
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DOJ - Tom Monheim - ok
PRM - Carrie Santos (ICRC ref) - ok

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